IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.437 of 2005

Exclusive Commodities Ltd. ...Petitioner

vs.

Shree Ram Trading Company. ...Respondent

Mr.S.S.Purohit i/b. M/s.Purohit & Co., for the Petitioner.

Mr.J.R.Chomal, for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 18th April, 2006.

P.C.:-

1. By this petition the petitioner challenges the Award made by the sole Arbitrator. By that Award the petitioner is directed to pay certain amount to the respondent. The dispute between the parties has arisen out of trading transactions in agricultural

commodities between the petitioner and the respondent. The transactions were conducted on the National Commodity and Derivatives Exchange Limited as per rules and regulations of that body. As the dispute arose between the parties, as per the rules and regulations of the National Commodities and Derivatives Exchange Ltd., the dispute was referred through arbitration process in terms of the rules and regulations of that body. The Respondent was the claimant before the learned Arbitrator. The first challenge to the Award is that the respondent which was a claimant before the learned Arbitrator is an unregistered firm and therefore, the arbitration at the instance of an unregistered firm is not maintainable. That objection was raised before the learned Arbitrator and the learned arbitrator has overruled that objection. The second challenge to the Award is that though by letter dated 7.3.2005 certain amount was claimed by the respondent, the agent of the respondent continued to deal with the petitioner, and therefore, the learned Arbitrator has erred in not considering the transactions carried out by the agent with the petitioner.

2. So far as the first objection is concerned, the learned Counsel appearing for the petitioner relies on the following judgments:-

(1) A Judgment of the Supreme Court in the case "Jagdish Chandra Gupta Vs. Kajaria Traders(India) Ltd, 1964 The Bombay Law Reporter VOL.LXVI 709”.

(2) “Delhi Development Authority Vs. Kochhar Construction Work and another, (1998)8 Supreme Court Cases 559”.

(3) “Kamal Pushpa Enterprises Vs. D.R. Construction Company, AIR 2000 Supreme Court 2676”.

(4) A judgment of the Supreme Court in the case “U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and another, (2004)7 Supreme Court Cases 332, and

(5) A judgment of the Single Judge of this Court in the case “Masood Mohammed Husain Vs. Gulam Rasul Mohammedali Sheikh and other, in the Arbitration Petition no.194 of 2005, dated 22.8.2005.

3. On the other hand the learned Counsel appearing for Respondent relies on the judgment of

the Supreme Court in the Case “Firm Ashok Traders and another etc. Vs. Gurumukh Das Saluja and others.etc., 2004(1) Arbitration LR 141 (SC)” and the judgment of the Division Bench of this Court in the case “Ram Nandan Prasad Sinha Vs. K.M.Consultants, AIR 2002 BOMBAY 90”.

4. Now so far as the judgment of the Supreme Court in the case “Jagdish Chandra Gupta vs. Kajaria Traders (India) Ltd.” is concerned, in that case the question that has been considered by the Supreme Court was about the maintainability of the application under Section 8(2) of the Arbitration Act,1940 at the instance of an unregistered partnership firm. The significant aspect of the judgment is that the dispute between the parties arose out of a partnership agreement which was not registered. The Supreme Court in the facts and circumstances of that case has held that the application under section 8 of the Arbitration Act,1940 for enforcement of rights under the partnership agreement which is not registered, is not maintainable. It appears from the judgment that the

question whether the arbitral proceedings at the instance of an unregistered partnership firm would be maintainable or not, is not decided by the Supreme Court by that Judgment.

So far as the judgment of the Supreme Court in the Case of "Delhi Development Authority vs. Kochhar Construction Work and another" is concerned, the question that the Supreme Court has considered in that case was “whether the suit filed under Section 20 of the Arbitration Act,1940 filed by the unregistered partnership firm was maintainable?”, and the Supreme Court has held that institution of a suit under Section 20 of the Arbitration Act,1940 by an unregistered firm is barred by sub-section (2) & (3) of Section 69 of the Partnership Act,1932. The Supreme Court has held that a suit filed under Section 20 of the Arbitration Act,1940 for appointment of Arbitrator would be the other proceedings within the meaning of sub section (3) of Section 69 of the Act. This judgment also does not consider the question that “whether the arbitral proceedings at the instance of an unregistered firm are maintainable or not?”.

So far as the judgment of the Supreme Court in the case "Kamal Pushpa Enterprises vs. D.R.Construction Company" is concerned the question that was being considered by the Supreme Court in that case was "whether the provisions of Section 69 of the Partnership Act prevents an unregistered firm defending the proceedings against it or it precludes such firm from initiating any proceedings”. In paragraph 6 of this judgment the Supreme Court has referred to its own judgment in the case of "Jagdish Chandra Gupta" and has observed thus:-

> “An application filed under Section 8 (2) of the Arbitration Act for the appointment of a named person or anyone else to go into the disputes between the parties was objected to, among other things on the ground that Section 69(3) of the Partnership Act afford a bar to the petition because the partnership was not registered. As against the conclusion of the High

Court that the application was maintainable, an appeal was filed in this Court. In construing the words, “a claim of set-off or other proceeding to enforce a right arising from a contract.....”, it was held that the section thinks in terms of (a) suits, and (b) claims of set-off which are in a sense of the nature of suits and (c) other proceedings and while the section first provides for exclusion of suits in sub-sections (1) and (2) of Section 69 the same ban is also applied to a claim of set-off and other proceedings to enforce any right arising from a contract. This Court ultimately construed the words “other proceedings” in sub-section (3) of Section 69 giving them their full meaning untrammelled by the words “a claim of set-off,” and held that the generality of the words “other proceedings” are not to be cut down by the latter words. The said

> case, being one concerning an application before the Court under Section 8(2) of the Arbitration Act,1940 in the light of the arbitration agreement, this Court finally held that since the arbitration clause formed part of the agreement constituting the partnership the proceeding under Section 8(2) was in fact to enforce a right which arose from a contract/agreement of parties.””

In paragraph 9 of the judgment the Supreme Court has observed thus:

> “The Award in this case cannot either rightly or legitimately said to be vitiated on account of the prohibition contained in Section 69 of the Partnership Act,1932 since the same has no application to proceedings before an Arbitrator.” (emphasis supplied)

It is true that in this case the arbitral proceedings

were not initiated by an unregistered firm. The Supreme Court has also not considered the question whether the Award is vitiated because the arbitral proceedings were initiated by an unregistered firm. The question that the Supreme Court was considering in this case was, as indicated above, whether an unregistered firm can defend the proceedings initiated for setting aside the Award and whether it can support the proceedings in the Court for making the Award rule of the Court. Nevertheless the Supreme Court has clearly observed that Section 69 of the Partnership Act does not operate in relation to proceedings before an Arbitrator.

So far as the judgment of the Supreme Court in the case of "U.P.State Sugar Corporation Ltd. Vs. Jain Construction Co. and another" is concerned, the Supreme Court in paragraph 7 has observed thus:-

> "The question as to whether Respondent 1 firm is registered or not is essentially a question of fact. It is true that the arbitral proceedings

would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act,1932. It has been so held in 'Jagdish Chandra Gupta V. Kajaria Traders(India) Ltd.' We may, however, notice that this Court in 'Firm Ashok Traders' despite following 'Jagdish Chandra Gupta' held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent firm was registered

> under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on.”

It appears from paragraph 7 of the judgment in the case of "U.P.State Sugar Corporation Ltd." quoted above that the Supreme Court has observed that the arbitral proceedings would not be initiated at the instance of an unregistered firm in view of the provisions of Section 69 of the Indian Partnership Act. However, in my opinion, these observations have been made in the light of the question that the Supreme Court was considering in that case. It is clear from paragraph 5 of that judgment that the question that was being considered by the Supreme Court was that “whether an application for appointment of an Arbitrator either under the Arbitration Act,1940 or under the Arbitration and Conciliation Act, 1996 at the instance of an

unregistered firm would be maintainable?” In any case, it is clear from the observations of the Supreme Court in its judgment in the case of "Kamal Pushpa Enterprises vs. D.R.Construction Company" that Section 69 of the Indian Partnership Act does not operate in relation to the proceedings before an Arbitrator.

So far as the judgment of the Division Bench of this Court in the case "Ram Nandan Prasad Sinha Vs. K.M.Consultants” is concerned, in that judgment the Division Bench of this Court has in terms held that the bar under Section 69 of the Indian Partnership Act is not attracted to arbitration proceedings without intervention of the Court. The relevant findings are to be found in paragraph 8 of the judgment which reads as under:-

> “In the light of the above, it is clearly seen that the bar under Section 69 is not attracted to arbitration proceedings without intervention of the Court and the reference and the award cannot be impinged on the ground of non-registration of the firm.”

In view of the clear findings recorded by the Division Bench of this Court in its judgment in the case of “Ram Nandan Prasad Sinha Vs. K.M.Consultants”, in my opinion, so far as this Court is concerned, there can be no debate on this question.

So far as the judgment of the Supreme Court in the Case "Firm Ashok Tranders and another Vs. Gurumukh Das Saluja and others” is concerned, in my opinion, that judgment cannot be relied on as the Supreme Court in its judgment in paragraph 10 and in paragraph 14 has made it clear that the observations that Supreme Court has made in that judgment are tentative. Similarly so far as the judgment of the Single Judge of this Court in the case “Masood Mohammed Hussain Vs. Gulam Rasul Mohammedali Sheikh and others” where firstly the Court was considering the maintainability of the application filed under Section 9 of the Arbitration & Conciliation Act,1996 at the instance of an unregistered firm and secondly, the Court in para.12 has observed that the observations in the order have been made for the

purpose of deciding the application filed under Section 9 of the Arbitration and Conciliation Act,1996 and therefore, those are prima facie observations. In my opinion, in view of the observations made in the judgment of the Division Bench in the case of "Ram Nandan Prasad Sinha vs. K.M.Consultants" an objection to the validity of the Award on the ground that the respondent firm is an unregistered firm cannot be accepted.

5. So far as the next submission is concerned, the learned Arbitrator has correctly considered the material available on record and has rightly rejected the case of the petitioner that he continued to deal with the agent of the respondent. The view that has been taken by the learned Arbitrator is a possible view of the material available on record and therefore, the Award, in my opinion, cannot be interfered with by this Court in its limited jurisdiction under Section 34 of the Arbitration and Conciliation Act,1996. The petition, therefore, fails and is dismissed. The petitioner to pay cost of this petition to the respondent as incurred by the

respondent.

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